Supreme Court, U.S.
FILED
MAR 14 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM 1977

NO. 77-1280

E. F. I., INC.

v.

M. I. I., A/K/A MARKETERS INTERNATIONAL, INC., ET AL

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

GEORGE R. PAIN
2 Houston Center
Suite 1016
Houston, Texas 77002
(713) 654-4437

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2, 3
Constitutional Provision Involved	3
Statement of Facts	3, 4
Reasons for Granting the Writ	4-8
Conclusion	8
Appendix A	A-1
Appendix B	B-1
Appendix C	C-1
Appendix D	D-1

CASE CITATIONS

CASES	Page
Amalgamated Clothing Workers of America v. Richman Bros., 348 U.S. 511	5
City of Altus, Okla. v. Carr, 255 F. Supp. 828, aff'd 385 U.S. 35	6
Colorado Anti-Discrimination Commission v. Continental Airlines, 372 U.S. 714	5
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440	7
National Bellas Hess, Inc. v. Dept. of Revenue of Illinois, 386 U.S. 753	6
Pike v. Bruce Church, Inc., 397 U.S. 137	7

Supreme Court of the United States

OCTOBER TERM 1977

NO._____

E. F. I., INC.

v.

M. I. I., A/K/A MARKETERS INTERNATIONAL, INC., ET AL

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Petitioner, E.F.I., INC., prays that a Writ of Certiorari issue to review the orders of the Supreme Court of the State of Texas rendered on November 16, 1977 and December 14, 1977.

OPINIONS BELOW

The Texas Supreme Court affirmed the judgment of the Fourteenth Court of Civil Appeals of Texas by refusing Petitioner's Application for Writ of Error and Motion for Rehearing thereon without opinion. The Fourteenth Court of Civil Appeals of Texas affirmed in part, and reversed and rendered in part the trial court's judgment in favor of Petitioner herein and the said Court of

Civil Appeals' opinion is published at 550 S.W.2d 401. Such opinion and judgment appears at Appendix A and B respectively, at pp. A-1 through A-8; B-1, B-2.

JURISDICTION

Petitioners timely filed a Petition for Writ of Error to the Texas Supreme Court complaining of the actions of the Texas Fourteenth Court of Civil Appeals (App. C, pp. C-1, C-2). In such Petition for Writ of Error, federal questions were duly raised in Points of Error 3 and 4 (App. C, p. C-1).

The Texas Supreme Court refused Petitioner's Petition for Writ of Error without opinion on November 16, 1977 and on December 14, 1977 overruled Petitioner's Motion for Rehearing (App. D, p. D-2).

This Petition for Writ of Certiorari was filed within 90 days from the date of the overruling of Petitioner's Motion for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

The Texas Courts refused to enforce a debt in the amount of $27,269.80 for goods sold and shipped from Florida to other states (90% of such sales) and to Texas (10% of such sales). The basis for such refusal was a holding that the underlying agreement which produced the sales was void and unenforceable by virtue of the Texas anti-trust laws. The questions thereby arising are:

1. Whether the action of the State of Texas constituted an impermissible burden which materially affected interstate commerce.

2. Whether the action of the State of Texas was in contravention of the Supremacy clause of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article 1, Sec. 8:

"The Congress shall have Power . . . (T)o regulate Commerce . . . among the several States . . ."

Constitution of the United States, Article 6, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF FACTS

Petitioner is a Florida Corporation manufacturing electronic equipment on which it holds U. S. patents. Petitioner entered into an agreement with Respondent, a Texas Corporation, granting Respondent an exclusive distributorship for the sale of Petitioner's products for a nationwide area (including Texas). Petitioner sued Respondent for goods sold from Florida to all parts of the nation and the jury found that Respondent owed $27,269.80. It was further established that Respondent's resale of Petitioner's products were made directly from Florida and such sales were 90% to other states and 10% to Texas. The trial court entered judgment for Petitioner for $27,269.80 plus interest and costs. (App. A, p. A-5).

The Respondent appealed to the Texas Fourteenth Court of Civil Appeals which Court held that the agreement between the parties was void and unenforceable because it was in violation of the Texas anti-trust laws. The Court of Civil Appeals accordingly reversed and rendered the trial court judgment and decreed that Petitioners herein take nothing. (App. A, p. A-8).

The Court of Civil Appeals recognized that the sales of the products under the agreement in question were made 90% outside Texas and 10% in Texas and had a direct relation to interstate commerce. Notwithstanding such recognition, that Court still gave priority and effect to the Texas anti-trust laws.

Petitioners herein filed their Petition for Writ of Error to the Texas Supreme Court pointing out the improper burden on interstate commerce as enforced by the Court of Civil Appeals. (App. C, pp. C-1, C-2). The Texas Supreme Court refused such Petition without opinion. (App. D, p. D-1).

REASONS FOR GRANTING THE WRIT

1. By its decision, the Texas Supreme Court has promoted and imposed an unreasonable, impermissible, and unconstitutional burden on interstate commerce.

Granted that the Texas Courts have, by their action, affected interstate commerce (App. A, p. A-7), the next question is whether such action is unconstitutional. Such questions as this should not be decided by fixed metes and bounds of rules of law abstractly applied, but courts should examine closely the facts of each case to determine whether the dangers and hardships of diverse regulation justify

foreclosing a State from exercise of its powers; and what is within the exclusive federal authority may first have to be decided by this Court. *Colorado Anti-Discrimination Commission v. Continental Airlines,* 372 U.S. 714; *Amalgamated Clothing Workers of America v. Richman Bros.,* 348 U.S. 511.

The action (or nonaction) of the Texas Supreme Court cannot be squared with the provisions of the United States Constitution which gives to Congress the exclusive power to regulate interstate commerce to the exclusion of the States. *U. S. Const.,* Art. 1, Sec. 8; Art. 6, clause 2. The opinion below states that 10% of the sales in question were sales of Petitioner's products in Texas and 90% were made in other states and that *such had a direct relation to interstate commerce.* (App. A, p. A-7) (Emphasis added)

Under the Constitution and the countless cases that have been decided in this area, it is axiomatic that a state cannot be the source of action that imposes a burden which materially affects interstate commerce.

In this case, Petitioner, through Respondent's sales as exclusive distributor, had shipped from Florida a number of patented items to points throughout several states, including Texas. Title passed from each sale from Petitioner to Respondent and then to the ultimate vendee. When Respondent refused to pay for the items, Petitioner sought to enforce its sale price in the Texas Courts which refused such remedy. Such action by Texas effectively blocks further sales or shipments from Florida to the other states under the arrangement between Petitioner and Resopndent; obviously a material and direct interference on interstate commerce.

The instant situation is similar to the interference and burden on interstate commerce that was struck down in *City of Altus, Oklahoma v. Carr,* 255 F. Supp. 828, aff'd 385 U.S. 35. In that case, the State of Texas attempted, by statute, to prohibit the withdrawal and transportation of underground water from Texas to Oklahoma. This Court affirmed the Federal District Court in Texas which held such statute to be an unreasonable burden on interstate commerce and decreed such statute void and unconstitutional.

Indeed, the instant fact situation goes much further than did the prohibited acts in *City of Altus.* The case now before us has Texas interfering with commerce that leads from Florida to other states without even coming into contact with Texas. Such far reaching effects of the Texas Courts are certainly not compatible with the traditional theories and interpretations of the Commerce clause.

Compare this case with the situation in *National Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753. In *Bellas Hess* there was a mail order business based in Kansas which did business in Illinois. The contacts with Illinois consisted of those produced by the mails and the common carriers bringing goods into Illinois. The Illinois attempted tax on such activities was struck down as an unreasonable burden on interstate commerce.

At least in the *Bellas Hess* case, the State of Illinois was attempting to put a burden on goods and activities *within the State of Illinois.* Not so in the instant case. Texas is attempting to cast the restrictions of its anti-trust statutes to a sale and shipment of goods from Florida to say, for example, Illinois. Such attempt is certainly impermissible.

2. There is no compelling interest in the State of Texas to justify the imposition of the burden on interstate commerce.

This Court has allowed some degree of state regulation of interstate commerce if the effects on interstate commerce are only incidental, unless the burden imposed on such commerce is clearly excessive "in relation to the putative local benefits." *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142; *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440.

In the *Pike* case, this Court struck down an Order of Arizona which required a shipper of cantaloupes to pack fruit in a certain manner before the shipper could transport the cantaloupes to his own packing shed in California a few miles away. Such requirement by Arizona would have required the shipper to construct a $200,000 packing plant in Arizona. This Court stated:

> But the State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant in the State. The nature of that burden is, constitutionally, more significant than its extent.

In the instant case, it is submitted that whatever local benefits may be obtained by the enforcement of the Texas anti-trust laws are far outweighed by the damage that such enforcement inflicts upon interstate commerce from Florida to other states.

Even though the Texas enforcement of its anti-trust law herein does not apparently impose a rigidity of re-

strictions on an entire industry, it does severely bind Petitioner with respect to Petitioner's interstate trade. Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved. *Pike v. Bruce Church, Inc.*, at 146, *Supra*. Here as in *Pike* the interest of the State of Texas is minimal at best.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the orders of the Texas Supreme Court.

Resepctfully submitted,

GEORGE R. PAIN
2 Houston Center
Suite 1016
Houston, Texas 77002
(713) 654-4437

APPENDIX A

Affirmed in part, and Reversed and Rendered in part, and Opinion filed April 20, 1977.

NO. 1552

M.I.I., also known as MARKETERS INTERNATIONAL, INC., ET AL,
Appellants

v.

E.F.I., INC., Appellee

Appeal from 127th District Court
of Harris County

This is an appeal from a judgment for plaintiff in a contract action, alleging the contract upon which plaintiff sued is unenforceable under the Texas antitrust laws. This is the second appeal in this case.

Appellee E.F.I., Inc. is a Florida corporation manufacturing electronic equipment on which it holds U.S. patents. On May 13th, 1968 George A. Harris, president of E.F.I., wrote to W. V. Womack, Jr., outlining

an exclusive dealership arrangement for the marketing of certain E.F.I. products. Womack replied, accepting the arrangement. Thereafter, to effectuate this agreement, appellant M.I.I., also known as Marketers International, Inc., was incorporated under Texas law, Womack and appellant George Levit each owning one-third of the corporate stock. On December 7, 1969 E.F.I. entered into an "Exclusive Dealer Agreement" with Marketers for the distribution of certain of its products. The contract provided in part:

> EFI does by this Agreement hereby appoint and does hereby designate Marketers to be the exclusive dealer and representative for the promotion, sale and distribution, in the territories as set forth and described in Appendix A, attached hereto and made a part hereof. The products covered by this Agreement are those listed in Appendix B, attached hereto.
>
> * * *
>
> 3. EFI agrees to sell all units to Marketers in accordance with the prices set forth in Appendix C, attached hereto.
>
> * * *
>
> 12. Cancellations of orders by Marketers' customers shall not constitute cancellation of any Marketers' orders to EFI.

Under an "Exclusive Distributor Agreement" dated August 4, 1970, Marketers was to become the sole distributor of certain E.F.I. products, subject to Marketers' purchase or orders tendered of designated quotas of units from E.F.I. It provided:

> 1. EFI does hereby authorize, appoint and designate Marketers to promote the sale of the products listed in Appendix "A" attached hereto and to be EFI's exclusive distributor in the United States, except for the Chicago, Illinois, area, as defined by DuPage, Lake, Cook and Will counties, for said products. . . .
>
> 2. EFI agrees to sell the products shown on Appendix "A" to Marketers in accordance with the prices set forth on Appendix "B" attached hereto.
>
> * * *
>
> 8. It is the intention of the parties to this agreement that Marketers shall at all times remain an independent contractor and shall do nothing to attempt in fact or create in the eyes of the public a partnership, principal-agent relationship, or employer-employee relationship with EFI.

Payment of Marketers' account due to E.F.I. was guaranteed unconditionally up to $100,000.00 by Levit and Womack, in an instrument executed March 21, 1969.

In December 1970 E.F.I. sued Marketers, Levit, and Womack for breach of the agreement. The defendants answered, alleging that the contracts violated the Texas antitrust laws and were thus invalid and unenforceable. The trial court granted a summary judgment for defendants based on their defense that the contracts were invalid. The Court of Civil Appeals for the First Supreme Judicial District reversed that judgment and remanded the case for trial. 492 S.W.2d 302. The court, at 305, held that if E.F.I.'s activities in Texas were only occasional and isolated and the contract was interstate as to

execution and performance, the federal antitrust laws should govern rather than those of Texas. The court said:

> It appears that in performing under the contract a considerable number of Marketers' sales and deliveries of merchandise would directly and necessarily relate to interstate commerce.
>
> * * *
>
> The record does not show to what extent the commerce affected was intrastate and thus subject to Texas law.

The court held that Marketers' summary judgment proof had not established "that the contract was intrastate as to performance or that the transactions contemplated by and carried out under the contract were essentially intrastate." The court also held an issue of disputed fact existed as to the question of whether the guarantee of Levit and Womack was executed prior to and was independent of the contracts. In a per curiam opinion, the Supreme Court of Texas refused Marketers' application for writ of error, no reversible error. 506 S.W.2d 579.

On remand, the case was tried before a jury and submitted on 51 special issues. The jury found, *inter alia,* that: (1) Marketers owed E.F.I. $27,269.80; (2) E.F.I. granted Marketers an exclusive distributorship for the sale of its products for an area including Texas under the December 1969 contract and August 1970 contract but not under the May 1968 letter agreement; (3) the letter agreement and the two contracts contemplated Marketers would serve as an exclusive distributor for

the sale of E.F.I. products in an area including Texas; (4) the personal obligation of Levit and Womack to pay for E.F.I. products was part of the consideration for the May 1968 letter agreement; (5) the March 1969 guarantee agreement of Levit and Womack was part of the consideration for the December 1969 and August 1970 contracts; (6) the activities of E.F.I. in Texas were more than occassional and isolated; and (7) Marketers' sales of E.F.I. products were made 10 percent in Texas and 90 percent outside of Texas. Based upon this verdict, the court entered judgment that E.F.I. recover from Marketers, Levit, and Womack, jointly and severally, the sum of $27,269.80, plus interest and costs.

Womack has not appealed from that judgment. Marketers and Levit appeal on seven points of error. Points one, two, and three complain of the court's error in overruling Marketers' motion for judgment and granting E.F.I.'s motion for judgment because the agreements to grant Marketers an exclusive dealership of E.F.I.'s products in Texas were in violation of the Texas antitrust laws and thus void and unenforceable. Points four through seven assert that it was error to enter judgment against Levit because his personal obligation to pay for products sold by E.F.I. to Marketers was part of the consideration for the May 1968 letter agreement, his guarantee agreement was part of the consideration for the contracts of December 1969 and August 1970, and these agreements were in violation of the Texas antitrust laws and are thus void and unenforceable. We sustain these points.

Section 15.02(b) of the Texas Business and Commerce Code Annotated (1968) defines a trust as:

a combination of capital, skill, or acts by two or more persons to

(1) restrict, or tend to restrict, trade, commerce, aids to commerce, the preparation of tangible personal property for market or transportation, or the free pursuit of a lawful business; or

* * *

(3) prevent or lessen competition in

(A) the manufacture, transportation, sale, or purchase of tangible personal property. . . .

Section 15.04 of the Code declares illegal and prohibits every trust defined in section 15.02, and provides that every agreement violating the prohibition against trusts is void and unenforceable in law or equity.

The agreements on their faces show a combination of capital, skill, and acts by the parties to restrict trade and commerce, and to prevent competition in the sale of tangible personal property. It is undisputed that the contracts made Marketers the exclusive distributor for certain E.F.I. products. As to those products, E.F.I. was limited to one distributor in Texas as well as almost all of the rest of the United States.

An agreement between a foreign supplier and a Texas distributor which gives the distributor exclusive sales rights within a territory in Texas is unenforceable. *Sherrard v. After Hours, Inc.*, 464 S.W.2d 87, 89 (Tex. Sup. 1971); *Climatic Air Distrib. v. Climatic Air Sales,* 162 Tex. 237, 241, 345 S.W.2d 702, 704 (1961).

The finding of the jury that 10 percent of Marketers' sales of E.F.I. products were made in Texas and 90 percent were made outside of Texas shows that the agreement had a direct relation to interstate commerce. But simply because inter-state commerce may be affected, the courts of Texas are not prohibited from giving effect to its antitrust laws. *Standard Oil Co. v. Tennessee,* 217 U.S. 413, 30 S.Ct. 543, 54 L.Ed. 817 (1909); *Gulf, C. & S.F. Ry. v. State,* 72 Tex. 404, 413, 10 S.W. 81, 85 (1888); *Elray, Inc. v. Catholic Protection Serv.,* 507 S.W.2d 570, 573 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); *State v. Southeast Tex. Chap. Nat'l Elec. Contractors Ass'n,* 358 S.W.2d 711, 714 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.), *cert. denied,* 372 U.S. 969, 83 S.Ct. 1094, 10 L.Ed.2d 131 (1963).

In its previous review of this case, the supreme court directed the courts on remand to consider the question of whether this contract, which violates the public policy of Texas, may be enforced in the state's courts. 506 S.W.2d at 580. The court said it was reserving that question because "state courts ordinarily will not enforce rights existing under laws of other jurisdictions when to do so would violate the public policy expressed in the statutes of the state of the forum." *Griffin v. McCoach,* 313 U.S. 498, 61 S.Ct. 1023, 85 L.Ed. 1481 (1941); *Bothwell v. Buckbee-Mears Co.,* 275 U.S. 274, 48 S.Ct. 124, 72 L.Ed. 277 (1927); *Byrd v. Crazy Water Co.,* 140 S.W.2d 334 (Tex. Civ. App.—Dallas 1940, no writ).

We find this case falls within the rule annonuced by the court. The contract called for performances in violation of our local antitrust laws. The courts of Texas

will not enforce such contracts, regardless of their validity in another state. *Byrd v. Crazy Water Co., supra,* at 336; *J. R. Watkins Co. v. McMullan,* 6 S.W.2d 823, 824 (Tex. Civ. App.—Austin 1928, no writ). The Supreme Court of the United States has held this position to be within the constitutional power of the Texas courts. *Griffin v. McCoach, supra,* at 506, 61 S.Ct. at 1027, 85 L.Ed. at 1486.

Appellee presents two counter-points. In its first counter-point, it asserts the Texas antitrust laws are not applicable to this transaction because it had a patent on the goods which were the subject of the sale and that the patent owner had the exclusive sales rights to the product which it could grant to Marketers. The First Court of Civil Appeals dealt with this question in its previous opinion. It held that while a patentee may impose restrictions upon the assignee of the patent, it cannot impose restrictions upon one who buys an already manufactured article. 492 S.W.2d at 306-07. The point is overruled.

The second counter-point asserts that Marketers was not entitled to any offset against its account owing to E.F.I. In view of our disposition of the case, we find it unnecessary to determine this question.

The judgment of the trial court is reversed, and judgment is rendered that appellee E.F.I., Inc. take nothing by its suit against appellants M.I.I. and George Levit. The judgment as to W. V. Womack is affirmed.

/s/ George E. Cire
Associate Justice

Judgment rendered, and Opinion filed April 20, 1977.

APPENDIX B

JUDGMENT

NO. 1552

M.I.I., ALSO KNOWN AS MARKETERS INTERNATIONAL, INC., ET AL

v.

E.F.I., INC.

"This cause, being an appeal from the judgment rendered and entered by the court below on August 19, 1976, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the judgment inasmuch as the contract involved called for performance in violation of our local antitrust laws, it is therefore considered, adjudged and ordered that the judgment of the court as to defendants/appellants, M.I.I., also known as Marketers International Incorporated, and George Levit, be reversed and this Court here now proceeds to render judgment that plaintiff/appellee, E.F.I., Inc., do have and recover nothing by its suit against defendants/appellants, M.I.I., also known as Marketers International Incorporated, and George Levit.

"And because it is further the opinion of this Court that inasmuch as defendant, Victor Womack, has not perfected an appeal, it is therefore considered, adjudged and ordered that the judgment of the court below as to defendant, Victor Womack, be and is affirmed in all things.

"It is further ordered that the appellee, E.F.I., Inc., pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

APPENDIX C

IN THE SUPREME COURT OF TEXAS

E.F.I., Petitioner

v.

MARKETERS INTERNATIONAL, INC.,
et al, Respondent

PETITION FOR WRIT OF ERROR ON BEHALF OF E.F.I., INC., APPELLEE IN CAUSE NO. 1552, FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS, WHEREIN MARKETERS INTERNATIONAL, INC., ET AL WERE APPELLANTS AND E.F.I., INC. WAS APPELLEE.

POINTS OF ERROR

1. The Court of Civil Appeals erred in holding that the contracts involved in the case at bar were violative of the prohibition against trusts and, therefore, void and unenforceable notwithstanding the fact that the contracts in question pertained to patented devices.

2. The Court of Civil Appeals erred in holding that the patentee's rights to impose restrictions on its assignee did not apply where it concerned an already manufactured article.

3. The Court of Civil Appeals erred in holding that the interstate commerce feature of the business between the parties did not bar Texas Courts from applying the Texas Anti-Trust Laws prohibition against assistance of the purported violator.

4. The Court of Civil Appeals erred in holding that contracts, which involve both interstate and intrastate transactions, which are contrary to the provisions of the Texas Anti-Trust Law will not be enforced by the Texas Courts.

5. The Court of Civil Appeals erred in holding that the guaranty of George Levitt was unenforceable because it was in violation of the Texas Anti-Trust Law.

6. The Court of Civil Appeals erred in failing to pass on the Counterpoints asserted by the Petitioner (Appellee in said Court), with regard to Petitioner's suit on a sworn account.

APPENDIX D

IN THE SUPREME COURT OF TEXAS

NO. B-6845

November 16, 1977

E. F. I., Inc.

v.

M. I. I., also known as Marketers International, Inc., et al.

From Harris County, Fourteenth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, E. F. I., Inc. pay all costs incurred on this application.

D-2

NO. B-6845

December 14, 1977

E. F. I., Inc.

v.

M. I. I., also known as Marketers International, Inc., et al.

From Harris County, Fourteenth District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 14th day of DECEMBER, 1977.

GARSON R. JACKSON, Clerk

By /s/ JUDITH E. SULLIVAN, Deputy
Judith E. Sullivan

Supreme Court, U. S.
FILED
APR 10 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM 1977

NO. 77-1280

E.F.I., INC.,
Petitioner

v.

M.I.I., A/K/A MARKETERS INTERNATIONAL, INC., ET AL, *Respondents*

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

GEORGE PAYNE
TOM R. LETBETTER
GARRETT, LETBETTER & PAYNE
715 Houston Club Bldg.
Houston, Texas 77002
(713) 224-2745

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
Jurisdiction	1
Questions Presented	2
Statement of Facts	3
Respondents' Reply to Petitioner's Reasons for Granting the Writ	6
Conclusion	14

CASE CITATIONS

CASES	Page
Bothwell v. Buckbee-Mears Co., 275 U.S. 274	12
Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179	9, 14
City of Altus, Oklahoma v. Carr, 255 F.Supp. 828	6
Duckworth v. Arkansas, 314 U.S. 390	9, 14
Griffin v. McCoach, 313 U.S. 498	8, 12
Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424	9, 14
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440	11
National Bellas Hess, Inc. v. Dept. of Revenue of Illinois, 386 U.S. 753	7
Pike v. Bruce Church, Inc., 397 U.S. 137	10
Sligh v. Kirkwood, 237 U.S. 52	8, 12
Standard Oil Co. of Kentucky v. Tennessee, 217 U.S. 413	8
State v. Southeast Texas Chapter of National Electrical Contractor's Assoc., 372 U.S. 969	13

Supreme Court of the United States

OCTOBER TERM 1977

NO. 77-1280

E.F.I., INC.,
Petitioner

v.

M.I.I., A/K/A MARKETERS INTERNATIONAL, INC., ET AL, *Respondents*

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Respondents, M.I.I., A/K/A Marketers International, Inc., and George Levit, file this response to prayer of Petitioner, E.F.I., Inc., that a Writ of Certiorari issue to review the orders of the Supreme Court of the State of Texas rendered on November 16, 1977, and December 14, 1977.

JURISDICTION

In Points of Error Number Three and Four filed in the Supreme Court of Texas (App. C, Petitioner's Brief) Petitioner complained of the refusal of the Texas Courts to allow a violator of the Texas Anti-Trust Laws (Peti-

tioner) to recover on a debt in Texas. In reviewing the "Questions Presented" to this Honorable Court, it appears doubtful that the questions raised by Petitioner in this Court have been previously raised in the Courts below. However, Respondents' reply to Petitioner's Petition will assume, for the moment, that this Court has jurisdiction to entertain the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

Petitioner sued Respondent, M.I.I. on a debt, and Respondent, Levit, as a guarantor of such debt. The Texas Fourteenth Court of Civil Appeals held that the debt was based on a contract which was in violation of the Texas anti-trust laws, and was thus unenforceable on behalf of Petitioner in the Courts of Texas. The Supreme Court of Texas refused Petitioner's Application for Writ of Error.

Petitioner states that the Questions thereby arising are whether the action of the State of Texas constituted an impermissible burden which materially affected interstate commerce, and whether such action was in contravention of the Supremacy clause of the United States Constitution.

An examination of the opinions in the Courts below reflect that the Courts of the State of Texas simply refused to allow Petitioner, a violator of the Texas Anti-Trust Act, to recover on a debt arising from its illegal actions. Neither the constitutionality of the Texas anti-trust laws, nor the violation of such laws by Petitioner, has been questioned. The real question in this case is whether the Texas anti-trust laws can co-exist with the United States Constitution when the State of Texas refuses to allow a violator of its anti-trust laws from using

Texas Courts to recover on a debt based on the violation of Texas law.

STATEMENT OF FACTS

The Statement of Facts outlined by Petitioner in its Brief does not completely and accurately show the involvement and the interest of the State of Texas in the case at bar. Therefore, the additional Statement of Facts hereinafter set out should be considered as a supplement, and in some cases, a correction, to the Statement of Facts set out by Petitioner. References cited to the record are page numbers in the Official Statement of Facts of the trial of this cause.

During the time that Marketers distributed E.F.I. products as an exclusive distributor, there was advertising of these products in Texas (R 72). Money for the sale of E.F.I. goods inside and outside of Texas was received in Texas (R 73). Marketers prepared information for its salesmen selling E.F.I. goods in Texas (R 75). Marketers had 50 to 75 agents selling E.F.I. goods while it was an exclusive distributor, and only 30 to 50 of these were outside the State of Texas (R 76). Those persons who sold E.F.I. goods for Marketers outside the State of Texas attended 8 to 10 meetings in Texas during a one-year period concerning this business (R 77).

E.F.I. products were shipped to Marketers in Texas under all the agreements between the parties, and sales were made in Texas (R 286-287). Marketers was incorporated in Texas; payments were made to Marketers in Texas for E.F.I. goods; Marketers sold E.F.I. goods in Texas; the home office of Marketers was in Houston, Texas; and all of these matters were discussed with George Harris, President of E.F.I. (R 287).

Marketers shipped E.F.I. goods to its customers in Texas (R 287).

George Harris came to Texas on several occasions to discuss business matters regarding Marketers exclusive distributorship of E.F.I. products (R 288). The three contracts under which the parties did business, the May 13, 1968, letter, the December, 1969, contract, and the August, 1970, contract were all discussed between Marketers and E.F.I. in Texas before they were signed (R 288).

Most of the warehouses for E.F.I. products sold by Marketers under the distributorship agreements were in Texas (R 288). The financing for Marketers was arranged in Houston, Texas; sales meetings and instructions of salesmen were done in Houston, Texas, with regard to the E.F.I. products; more of the salesmen of E.F.I. products under the exclusive distributorship agreements with Marketers were to be in Texas and from Texas rather than any other state, and all of the foregoing was discussed with George Harris (R 289).

The Board of Directors meetings of Marketers, most of the officers, and most of the secretaries were in Texas, and most of the advertising and executive decisions were made in Texas (R 290).

Most of the customer complaints concerning E.F.I. products were made to Marketers in Houston (R 290). George Harris sent representatives of E.F.I. to Texas who found many bad transducers and switches in the E.F.I. products sold to Marketers in Texas (R 344).

Ten percent (10%) of Marketers sales of E.F.I. products were in Texas (R 524-525).

George Harris, President of E.F.I., testified that Marketers was the only exclusive dealer E.F.I. had in Texas (R 705). He further testified that all three contracts (including the May 13, 1968, letter) and the guarantee agreement, were the only agreements under which Marketers worked with E.F.I. (R 707). Mr. Harris admitted coming to Houston and working in the Marketers offices with Marketers salesmen, and helping to organize the office for the sale of E.F.I. products (R 708). Mr. Harris stated that Marketers took all the credit risks with regard to the sale of E.F.I. products sold to Marketers (R 709). Mr. Harris stated that E.F.I. considered all goods invoiced to Marketers a sale at that time to Marketers by E.F.I. during the existence of the distributorship agreements (R 735).

There were a total of 2,733 units shipped by E.F.I. while it was dealing with Marketers, and 792 were returned (R 753). Forty-three of the returns were from Texas customers (R 752).

It was contemplated by Mr. Harris in all of the business contracts and agreements with Marketers that Marketers would receive E.F.I. goods in Texas, sell the E.F.I. goods in Texas, that Marketers would be incorporated in the State of Texas, and receive payment for its sales in Texas (R 791-792).

M.I.I. paid E.F.I. or received credit from E.F.I. in the amount of $155,618.36, (over $90,000.00 of which were cash payments for goods) from January 1, 1970, until the parties ceased to do business (R 508).

The last contract between the parties was terminated on or about October 1, 1970 (R 1153-1154).

RESPONDENTS' REPLY TO PETITIONER'S REASONS FOR GRANTING THE WRIT

I.

THE TEXAS SUPREME COURT HAS NOT PROMOTED OR IMPOSED AN UNREASONABLE, IMPERMISSIBLE AND UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE BY REFUSING TO ALLOW PETITIONER TO USE THE COURTS OF THE STATE OF TEXAS TO RECOVER ON A DEBT WHICH AROSE FROM A CONTRACT IN VIOLATION OF THE TEXAS ANTI-TRUST LAW.

Texas has not prevented Petitioner from selling its goods in Texas; from entering into valid, legal contracts in the State of Texas; from selling its goods anywhere in the United States; from suing on its debt in any other state of the union; from transporting its products into Texas; nor leveled any restrictions on the sale of Petitioner's product in the State of Texas. The Courts of the State of Texas have simply told Petitioner that it cannot recover on a debt in Texas Courts which is based on a contract in violation of the Texas Anti-Trust Act.

Petitioner has cited two cases which it states exhibit an impermissible interference and burden on interstate commerce. The first case is *City of Altus, Oklahoma v. Carr,* 255 F.Supp. 828 (W.D. Tex., 1966). In that case the State of Texas attempted to prevent a Texas resident from selling water from his land to an Oklahoma user. The Court held that such a restriction did constitute a direct burden upon and interference with interstate commerce. That case is far different from the case at bar.

There simply has been no attempt by the State of Texas to inhibit or restrict the flow of goods in any way in the case before this Court. There has been no attempt to restrict sales in interstate commerce.

Petitioner also cites *National Bellas Hess Inc. v. Dept. of Revenue of Illinois,* 386 U.S. 753, 87 S.Ct. 1389 (1967). In that case the U.S. Supreme Court refused to allow Illinois to impose a tax on National Bellas Hess when National's only contacts with Illinois were through the mail. It should be noted that the Court went to great lengths to show that National had no contact with the State of Illinois except by mail. At page 1392, the Court did point out that it had upheld the right of Florida to impose upon a Georgia seller the duty of collecting a state use tax upon the sale of goods shipped to customers in Florida where there was business activity of the Georgia seller in Florida:

> "There we held that Florida could constitutionally impose upon a Georgia seller the duty of collecting a state use tax upon the sale of goods shipped to customers in Florida. In that case the seller had '10 wholesalers, jobbers, or "salesmen" conducting continuous local solicitation in Florida and forwarding the resulting orders from that State to Atlanta for shipment of the ordered goods'."

The contacts of E.F.I. with the State of Texas are significant as witnessed by the record of its activities in Texas. It chose to bring this suit in Texas. The *National case, supra,* is far different because the decision of the Court was based on the lack of contact of National with Illinois.

Petitioner is completely incorrect in its statement that Texas is attempting to cast restrictions based on its anti-trust statutes to the sale and shipment of goods from Florida to other states. Texas has simply refused to allow Petitioner to use the Texas Courts as a forum for the recovery of a debt based upon a contract which is illegal in Texas. Petitioner has sold and will no doubt continue to sell its goods in every state of the union outside of the contract which has long since been cancelled with respondents.

This Court, on a number of occasions, has had an opportunity to determine under what circumstances a burden on interstate commerce may be held unreasonable, impermissible and unconstitutional. In *Standard Oil Co. of Kentucky v. Tennessee,* 217 U.S. 413 (1910), 30 S.Ct. 543 (1909), the State of Tennessee forbade a Kentucky corporation from doing business, other than interstate commerce, in Tennessee. The reason for the denial of the Kentucky corporation's right to do business in Tennessee was a violation of that state's anti-trust law. This Court upheld the right of Tennessee to enforce its anti-trust statutes.

In *Sligh v. Kirkwood,* 237 U.S. 52 (1915), 35 S.Ct. 501 (1914), the State of Florida litigated against the shipment of immature or otherwise unfit citrus fruits. This Court recognized the authority of the state to use its police powers to regulate even though such regulations might involve interstate commerce.

In *Griffin v. McCoach,* 313 U.S. 498, 61 S.Ct. 1023 (1941), the lower courts had held that beneficiaries under a life insurance policy could recover the proceeds even though the beneficiaries had no insurable interest in

the life of the deceased under Texas law. This Court reversed the decision of the Circuit Court of Appeals and remanded the case. At this point the Court squarely faced whether the application of Texas laws "would constitute an unwarranted extra-territorial control of contracts and regulation of business." The Court held that the Texas Courts could constitutionally refuse recovery to the beneficiaries if they did not have an insurable interest under Texas law. The Court pointed out that a state would not be required to lend the aid of its Courts to enforce a a contract against the public policy of the state, and could constitutionally refuse to lend its aid to enforce foreign contracts which required the doing of prohibited acts within the state of the forum.

In *Duckworth v. Arkansas,* 314 U.S. 390, 62 S.Ct. 311 (1941), this Court upheld Arkansas statutes prohibiting transportation of liquor, holding that there was no undue burden on interstate commerce and that there was no interference with the free flow of commerce beyond that which a state is allowed to do in preventing unlawful distribution of liquor in that state.

In *Cities Service Gas Co. v. Peerless Oil & Gas Co.,* 340 U.S. 179, 71 S.Ct. 215 (1950), this Court affirmed the right of the state to enforce state regulations which have some impact on interstate commerce as long as the regulations are not discriminatory and do not place an embargo on interstate commerce. There was no discrimination or embargo on E.F.I. products.

In *Head v. New Mexico Board of Examiners in Optometry,* 374 U.S. 424, 83, S.Ct. 1759 (1963), this Court stated that state statutes which are otherwise valid must be upheld unless there is an actual conflict between

state and federal schemes of regulation to the extent that both cannot stand in the same area, or unless there is evidence of a congressional design to pre-empt the field.

The Congress of the United States has never attempted to preclude states from enacting anti-trust laws. The State of Texas in the case at bar has not attempted to prohibit interstate commerce nor to impose restrictions upon it. The State of Texas has simply used its constitutional authority recognized by the Supreme Court of the United States to prevent the use of its Courts for a recovery based upon a violation of its anti-trust laws.

II.

THE STATE OF TEXAS HAS A PROPER INTEREST IN THE ENFORCEMENT OF THE LAWS OF ITS STATE TO JUSTIFY THE DENIAL OF THE USE OF ITS COURTS BY PETITIONER TO RECOVER ON A DEBT FOUNDED ON A CONTRACT IN VIOLATION OF TEXAS ANTI-TRUST LAW.

The Statement of Facts sets out the enormous contact that the State of Texas had with the business out of which Petitioner's suit arose. Petitioner cites *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970), for the proposition that there must be significant local interest for the state in order to allow an imposition on interstate commerce by state law. In the *Pike case,* this Court pointed out that the desire of Arizona to have its name on its produce amounted not to a complaint by Arizona that the company was putting the good name of Arizona on an inferior or deceptively packaged product, but because the company was not putting the name of Arizona on a product that was superior and well-packaged. The State of Arizona wanted its name to appear on the products though they were to be shipped only about 31 miles for the purposes of processing and packaging in another state. This Court rightly held that the burden of requiring the company to construct a $200,000.00 facility to package the products was too large a burden compared to the interest of Arizona in having its name on a product during the time it was shipped 31 miles for processing and packaging. In the case at bar, however, Petitioner faces no such burden. It can still ship its goods anywhere in the United States and sell them without additional expense. The Courts of Texas have simply refused to allow the Petitioner to collect on a debt in Texas because of the violations of Texas anti-trust laws.

The other case cited by Petitioner is *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 80 S.Ct. 813 (1960). That case is especially significant because it points out that federal and state regulation may coexist, and the local regulations should be given full force and effect even though there might be some effect on interstate commerce. In that case the pollution regulations of the City of Detroit were upheld even though they were applied to vessels which had been approved in accordance with federal law. This Court pointed out that its decisions had always sought to enjoin the seeking out of conflicts between state and federal regulations where none clearly exist. This Court further stated that state regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.

This case clearly points out that Texas anti-trust laws can exist with the right of the federal government to regulate interstate commerce. Petitioner's right to act in interstate commerce is not restricted by the fact that the Texas Courts will not entertain its suit on a debt based on violations of Texas anti-trust law. Many of Petitioner's products were sold in Texas by M.I.I. from its Texas warehouses. The interest of the State of Texas is clear in enforcing its anti-trust laws under such a situation. The right of Petitioner to sell its products elsewhere, and even to enforce suits for collection of debts based on the sales is not impaired by the application of Texas anti-trust laws in a Texas Court.

In *Bothwell v. Buckbee-Mears Co.*, 275 U.S. 274, 48 S.Ct. 124 (1927), this Court was faced with a contract which was obnoxious to Minnesota law and was attempted to be enforced in Minnesota. The Maryland company seeking to enforce the contract was held to have been properly refused access to the Minnesota Courts to enforce its contract. This is entirely consistent with *Griffin v. McCoach, supra,* to the effect that a state does have a vital interest in enforcing its own law, even if there is some effect on interstate commerce. Likewise, in *Sligh v. Kirkwood, supra,* the authority of the state tc regulate products within its state being shipped in interstate commerce was upheld. The State of Texas in the case at bar is not taking any affirmative action to prevent or inhibit interstate commerce. It is simply acknowledging the existence of its own anti-trust laws in order to deny the use of its Courts for a collection of a debt in violation of these statutes. If the State of Texas were not allowed to enforce its anti-trust laws merely because a product involved in the anti-trust laws was used in interstate

commerce, it would effectively prohibit the State of Texas from ever enforcing any of its anti-trust laws, or even recognizing their existence because almost every product imaginable has some relation to interstate commerce.

This Court denied Petition for Writ of Certiorari in a Texas case where both federal and state anti-trust statutes were involved. In *State v. Southeast Texas Chapter of National Electrical Contractor's Assoc.*, 358 S.W. 2d 711 (1962), cert. den., 372 U.S. 969, 83 S.Ct. 1098, 10 L.Ed.2d 131 (1963), the State of Texas filed a civil anti-trust suit for violations of its anti-trust laws within the State of Texas. The same Defendants were also faced with a federal criminal indictment. The Court of Civil Appeals in Texas held that the state suits could be properly continued even though the federal indictments were pending. It is worthy of note that the United States by amicus curiae brief pointed out that the Sherman Act did not pre-empt the field of regulation of interstate trade and commerce thereby precluding Texas from exercising jurisdiction over anti-trust matters in the exercise of the police power of the State of Texas. This was held true even though 75-90 percent of the electrical equipment involved in that case was manufactured in states other than Texas and shipped in interstate commerce to Texas. In that case it was crystal clear that the State of Texas had a right to enforce its own anti-trust laws even though they dealt with products in interstate commerce and the federal government had also enacted statutes in the same area which were being implemented in companion cases of the same type. It is absolutely untenable, based upon this opinion and the others cited in this brief, that the State of Texas should not be allowed to deny the use of its Courts to a violator of its laws.

Any State has a vital compelling interest in the enforcement of its laws. In *Duckworth v. Arkansas, supra, Cities Service Gas Co. v. Peerless Oil & Gas Co., supra,* and *Head v. New Mexico Board of Examiners in Optometry, supra,* the interest of a state in enforcing its own laws was recognized even though the application of those laws was made in situations which involved interstate commerce.

CONCLUSION

The key to analysis of Petitioner's Petition for Writ of Error is the realization that the State of Texas has previously been held by this Court to have the right to deny the use of its courts to a violator of its laws, and to withhold relief to a party if granting such relief would violate its laws and public policy. Equally important is the fact that the ability of Petitioner to act in interstate commerce is not restricted by the fact that the Texas Courts will not entertain a suit upon its debt founded upon contracts which violate Texas anti-trust law. For all these reasons the Petition for Writ of Certiorari to the Supreme Court of the State of Texas should be denied.

Respectfully submitted,

GARRETT, LETBETTER & PAYNE

By: George Payne

GEORGE PAYNE
TOM R. LETBETTER
715 Houston Club Bldg.
Houston, Texas 77002
(713) 224-2745

CERTIFICATE OF SERVICE

I hereby certify that 3 true and correct copies of the above and foregoing Respondents' Reply to Petition For Writ of Certiorari to the Supreme Court of the State of Texas, has been hand delivered to Attorney GEORGE PAIN, 2 Houston Center, Suite 1016, Houston, Texas 77002, on this 24 day of April, 1978.

George Payne

GEORGE PAYNE